

Court of Appeals No. 43039-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON

Plaintiff/Respondent,

v.

EDUARDO SANDOVAL,

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 10-1-04055-4  
The Honorable Linda CJ Lee, Presiding Judge

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## **I. ASSIGNMENT OF ERROR**

The State presented insufficient evidence to convict Mr. Sandoval of any crime.

## **II. ISSUES PRESENTED**

1. Was there sufficient evidence to convict Mr. Sandoval of first degree murder where there was no evidence Mr. Sandoval acted as an accomplice to the shootings?
2. Was there sufficient evidence to convict Mr. Sandoval of first degree assault where there was no evidence Mr. Sandoval acted as an accomplice to the shootings?
3. Was there sufficient evidence to convict Mr. Sandoval of conspiracy to commit murder where there was no evidence Mr. Sandoval agreed to commit premeditated murder?

## **III. STATEMENT OF THE CASE**

### *A. Factual Background*

On February 5, 2010, Carlos Basilio, Alfredo Villagomez, Juan Ortiz, Eduardo Sandoval, Santiago Mederos, Time Time, Dean Salavea, Juan Zuniga, and Naitaalii Toleafoa were drinking at the El Gallo de Oro bar. RP 1920, 2526-2531, 2725. Some of the men were members of the Eastside Lokotes Sureños (ELS) street gang. RP 2519, 2524-2526.

As the men were leaving the bar, a car drove by and shot at the men. Mr. Toleafoa was hit and was eventually taken to the hospital. RP 2531.

That same night someone fired shots at the apartment of Byron Alvarez, a friend of the ELS gang. RP 2533, 2539. The ELS has rival gangs known as the ESPs and ESLs. RP 2536. The ELS gang members believed that the ESPs had shot at them because members of the ELS had gotten into a fight with ESPs earlier that day. 2539-2542.

Juan Zuniga was the leader of the ELS. RP 1903, 2542-2543. A meeting of the gang was held at Mr. Zuniga's house the day after the shooting at the bar. RP 2543-2544. Present at the meeting were Mr. Basilio, Mr. Sandoval, Saul Mex, Mr. Time, Mr. Salavea, Mr. Gonzalez, Mr. Sanchez, and Jared Messer. RP 1927, 2544, 2546. The gang members met in the garage and smoked marijuana. RP 2545. A plan was made to retaliate against the people the ELS suspected had shot at them. RP 2546. The discussion was mostly Mr. Zuniga telling the other people what they were going to do. RP 1925-1926. Mr. Zuniga did most of the talking and nobody responded to him. RP 1926. Mr. Sandoval was not talking during the retaliation discussion. RP 1925. The meeting lasted about an hour and Mr. Zuniga was the only one talking during that hour. RP 1928.

The plan was for some people to drive around the Eastside while others would be in a stolen van and would be responsible for shooting. RP 963-965, 1928-1929. Mr. Mex and Mr. Mederos were to be driven

around in the stolen van by Mr. Messer and would be the shooters. RP 1929, 2546. Everyone else was going to drive around in case something happened. RP 2546. Mr. Zuniga told Mr. Sandoval and Mr. Gonzalez that they were supposed to look for cops and Bloods in the area of 72<sup>nd</sup>. RP 1916-1917, 2040-2041, 2043.

The following day, meetings were held at the homes of Mr. Zuniga and Mr. Sanchez. RP 2548-2549. The meeting at Mr. Zuniga's home occurred around 1 p.m. RP 2548-2549. Present at the meeting at Mr. Zuniga's home were Mr. Basilio, Lil Tripper, Mr. Mex, Lil Blackie, Mr. Time, and Mr. Salavea. RP 2550. The meeting was again held in Mr. Zuniga's garage and the men again all smoked marijuana and spoke about the shooting. RP 2550. Mr. Sandoval was not at this meeting. RP 2724-2725, 2727. The men discussed retaliation and how they were going to get back at the ESPs. RP 2550-2551. The plan had changed to Mr. Mex being the shooter and Mr. Messer being the driver. Mr. Mederos said he was going to go with Mr. Mex. RP 2551. The men left Mr. Zuniga's home and travelled to Mr. Sanchez's home. RP 2551- 2552.

The meeting at Mr. Sanchez's home occurred around 7 p.m. RP 2549. Present at the meeting at Mr. Sanchez's home were Mr. Basilio, Mr. Messer, Lil Blackie, Mr. Time, Mr. Salavea, Mr. Sanchez, Mr. Mex, Mr. Mederos, Antonio Gonzalez, and Mr. Sandoval. RP 2548, 2552. The



men retrieved a white van that had been stolen and parked near Mr. Sanchez's home. RP 2552-2553. Mr. Mex, Mr. Messer, and Mr. Mederos got into the van. RP 2553. Mr. Zuniga told Mr. Sandoval and Mr. Gonzalez to look for cops and rival gang members. RP 1193. Mr. Gonzalez and Mr. Sandoval left in Mr. Gonzalez's black Tahoe and drove to the east side. RP 2554-2555. Mr. Zuniga rode with Mr. Basilio and Mr. Basilio heard Mr. Zuniga speaking to Mr. Messer over the phone or by using walkie-talkies. RP 2555-2558.

Mr. Gonzalez and Mr. Sandoval left the meeting together. RP 1936. Mr. Gonzalez had his children with him in his Chevy Tahoe. RP 1936. Mr. Gonzalez drove towards 72<sup>nd</sup> on the Eastside of Tacoma. RP 1937. Mr. Gonzalez drove to McKinley Park where he and Mr. Sandoval smoked marijuana outside of the Tahoe while Mr. Gonzalez's children watched a Disney movie in the back of the Tahoe. RP 1939, 2044. Mr. Gonzalez and Mr. Sandoval had no intention of participating in the activity of the gang. RP 2044.

Mr. Gonzalez and Mr. Sandoval eventually left McKinley Park because the white van driven by Mr. Messer drove by the park and contacted Mr. Gonzalez and Mr. Sandoval. RP 1940-1941, 2045-2047. Had the white van not driven by, Mr. Sandoval and Mr. Gonzalez would

have stayed in the park and smoked marijuana until they went home. RP 2045.

At some point that evening, Mr. Sandoval and Mr. Gonzalez saw police officers at a Keybank. RP 1917-1918, 2048. Mr. Gonzalez could not remember who called who, but a telephone call was made during which Mr. Sandoval told Mr. Zuniga that they had seen the police at the Keybank. RP 1918, 2048.

After leaving McKinley Park, Mr. Gonzalez and Mr. Sandoval drove towards 72<sup>nd</sup> street and ended up parking behind Boze Elementary school. RP 1939. The men stayed there and smoked more. RP 1940. After a while Mr. Gonzalez's children got hungry so he and Mr. Sandoval drove them to a McDonald's. RP 1941-1942. As the men were in the drive-through, police drove by with lights and sirens on. RP 1942. The men then got a phone call saying that it was "hot" around that area so Mr. Gonzalez took Mr. Sandoval home. RP. 1942.

The next day Mr. Messer spoke with Mr. Gonzalez at their work and told Mr. Gonzalez that he and the others were driving around in the van and they started shooting at a red car in which a male passenger was throwing gang signs. RP 1943-1944. Mr. Messer told Mr. Gonzalez that he followed the red car and they started shooting at the car near 56<sup>th</sup> and Portland. RP 1944.

The red car shot at by the men in the van was occupied by Joshua Love and his sister, Camille Love. RP 589-597. Mr. Love was shot two times. RP 617. Ms. Love was shot three times and died from her wounds. RP 1556-1565.

Police investigation lead to the arrest of Mr. Sandoval. RP 3155. Mr. Sandoval spoke with police after being arrested. Plaintiff's Exhibit 5-F, p 2-20. Mr. Sandoval admitted to having been present at the meetings where Mr. Zuniga devised the plan to look for someone to shoot, but denied that he had ever intended to actually participate in the shootings. Plaintiff's Exhibit 5-F, p. 6-20. Mr. Sandoval told police that he had wanted nothing to do with any retaliatory shooting (Plaintiff's Exhibit 5-F, p. 7-9), that he got into Mr. Gonzalez's car because Mr. Gonzalez had his children with him and that he knew that Mr. Gonzalez would not engage in any unlawful behavior with his children in the car, that he wanted to distance himself from the rest of the activities (Plaintiff's Exhibit 5-F, p. 8-9, 16), and that he was planning to just go home. Plaintiff's Exhibit 5-F, p. 11. Mr. Sandoval told police that he and Mr. Gonzalez just drove around, stopped at a park and smoked a bit, and eventually went to a McDonald's. Plaintiff's Exhibit 5-F, p. 12, 17. Mr. Sandoval told police that he spoke with Mr. Zuniga via telephone that night, but denied being

the one who initiated the call and denied telling Mr. Zuniga that he had seen police. Plaintiff's Exhibit 5-F, p. 12.

*B. Procedural Background*

On September 23, 2010, Mr. Sandoval was charged with two counts of first degree murder and one count of conspiracy to commit first degree murder. CP 1-3. All crimes were charged with firearm and gang aggravators. CP 1-3.

On March 11, 2011, the State moved to join Mr. Sandoval's trial with the trials of Mr. Messer, Mr. Mex, Mr. Time, and Mr. Salavea. CP 59-63.

On September 30, 2011, the charges against Mr. Sandoval were amended to one count of first degree murder, one count of second degree assault, and one count of conspiracy to commit murder in the first degree. CP 82-83. All crimes were charged with firearm and gang aggravators. CP 82-83.

On October 11, 2011, the charges against Mr. Sandoval were amended to change the second degree assault charge to a first degree assault charge. CP 85-86. A hearing was held that day regarding the admissibility of Mr. Sandoval's statement. RP 58-118.

Also on October 11, 2011, Mr. Sandoval filed a motion and memorandum in support of the motion to suppress his statement to police. CP 87-99.

On October 12, 2011, the State filed a motion to admit evidence of the defendants' gang activity to establish motive, premeditation, and res gestae. CP 195-200.

On October 17, 2011, the trial court held that Mr. Sandoval's statement to the police was admissible. RP 266-270. The trial court also held that the gang-related evidence was admissible under ER 404(b) for the limited purposes of showing motive, premeditation, res gestae, and intent. RP 346.

On October 24, 2011, Mr. Salavea's trial was severed from that of the other defendants. RP 399-400.

Mr. Sandoval's trial began on October 31, 2011. RP 570.

On December 21, 2011, a redacted version of Mr. Sandoval's statement to police was read to the jury. RP 3178-3218; Plaintiff's Exhibit 5-F.

On January 4, 2012, Mr. Time and Mr. Messer pled guilty. RP 3485-3505, 3551-3564.

The State rested its case on January 4, 2012. RP 3527. At the close of the State's case, Mr. Sandoval moved for dismissal of the charges

against him for lack of sufficient evidence under *State v. Green*.<sup>1</sup> RP 3529-3530.

On January 5, 2012, the trial court denied Mr. Sandoval's "half-time" motion to dismiss the charges against him. RP 3566-3576.

Mr. Sandoval presented no evidence and rested his case on January 5, 2012. RP 3586. Mr. Mex also pled guilty on January 5, 2012. RP 3589-3608.

On January 6, 2012, after Mr. Sandoval had rested, the State moved to reopen its case for purposes of introducing Mr. Sandoval's full statement to the police for purposes of bolstering the credibility of the State's cooperating witnesses due to the attacks on the credibility of those witnesses by the defendants. RP 3611-3616.

On January 6, 2012 Mr. Sandoval filed an objection to the State reopening its case in chief in order to have Mr. Sandoval's unredacted statement played for the jury. CP 293-295.

The trial court overruled Mr. Sandoval's objection and permitted the State to play a recording of Mr. Sandoval's statement to the police to the jury. RP 3611-3627.<sup>2</sup> The State reopened its case and played a

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<sup>1</sup> Although not specifically identified at argument on the motion to dismiss, presumably trial counsel was referring to *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

<sup>2</sup> Mr. Sandoval's statement was played for the jury in its entirety, save for a segment which might have been interpreted by the jury as the police commenting on Mr. Sandoval's credibility. RP 3615-3616. An unredacted transcript was admitted as Plaintiff's exhibit 5. The portion of Mr. Sandoval's statement that was not played for the jury runs from page four lines 12 through 35. RP 3615-3616; Plaintiff's Exhibit 5.

recording of Mr. Sandoval's statement for the jury. RP 3642-3646. After playing the recording both the State and Mr. Sandoval rested. RP 3646.

On January 12, 2012, the jury found Mr. Sandoval guilty of all charges, found that Mr. Sandoval was armed with a firearm during all crimes, and found the gang aggravator applied to all crimes. CP 352, 354-361; RP 3770-3777.

On February 3, 2012, the trial court entered findings of fact and conclusions of law regarding the admissibility of Mr. Sandoval's statement to police. CP 362-365.

Also on February 3, 2012, despite having no prior felony convictions, Mr. Sandoval was given an exceptional sentence of all terms of confinement running consecutively for a total of 904 months total confinement based on the gang motivation aggravator. CP 366-379.

Notice of appeal was filed on February 7, 2012. CP 380-394.

#### **IV. ARGUMENT**

**The State presented insufficient evidence to convict Mr. Sandoval of any crime.**

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108

Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn. App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). “Substantial evidence is evidence that ‘would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817, *quoting State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). “Substantial evidence” cannot be based upon “guess, speculation, or conjecture.” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817.

It is the jury’s function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury’s findings must be supported by substantial evidence in the record. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In*



*re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The final charges against Mr. Sandoval were as follows: accomplice to first degree murder in violation of RCW 9A.32.030(1)(b); accomplice to first degree assault in violation of RCW 9A.36.011(1)(a); and conspiracy to commit first degree murder in violation of RCW 9A.32.030(1)(a). CP 85-86. Although not referenced in the second amended information (CP 85-86), conspiracy to commit a crime is criminalized under RCW 9A.28.040(1). The State alleged that Mr. Sandoval or an accomplice was armed with a firearm during the commission of all crimes, and alleged that all crimes were aggravated

under RCW 9.94A.535(3)(aa) as being performed to benefit a street gang.  
CP 85-86.

1. The State presented insufficient evidence to establish that Mr. Sandoval was an accomplice to any crime.

Under RCW 9A.08.020(3),

A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it.

Jury instruction number 6 contained the language of RCW 9A.08.020(3)(a) verbatim. CP 326.

A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993); *see also State v. Robinson*, 73 Wn. App. 851, 855, 872 P.2d 43 (1994). “One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it

succeed.” *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987), *abrogated on other grounds State v. McDonald*, 138 Wn.2d 680, 981, P.2d 443 (1999).

Washington case law has consistently stated that physical presence and assent alone are insufficient to constitute aiding and abetting: “[I]n order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged.” *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). *See also Luna*, 71 Wn.App. at 759, 862 P.2d 620 (“Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.”), *citing State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). Presence at the scene of an ongoing crime may be sufficient if a person is “ready to assist.” *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. The accomplice must do something in association with the principal to accomplish the crime. *State v. Boast*, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976).

The State presented no evidence that Mr. Sandoval was present at the scene of the shooting, that Mr. Sandoval assented to the shooting, that

Mr. Sandoval was ready to assist in the shooting, or that Mr. Sandoval performed any action knowing that he was promoting or facilitating the shooting of the Loves. Indeed, the evidence introduced at trial indicated that Mr. Sandoval was *not* at the scene of the shootings (RP 1194-1195, 1916), that Mr. Sandoval did not assent to and had no intent to assist in the shootings (RP 2042-2044; Plaintiff's Exhibit 5-F, p. 7-9, 11-12, 16), that Mr. Sandoval and Mr. Gonzalez had disobeyed Mr. Zuniga's orders to look out for cops and rival gang members and had parked and smoked marijuana instead (RP 2044-2046, 2055-2056; Plaintiff's Exhibit 5-F, p. 12, 17), and that Mr. Sandoval's plan on the night of the shooting was to distance himself from the actions involved with the shooting and to just go home. Plaintiff's Exhibit 5-F, p. 8-9, 11, 16.

The only evidence which might suggest that Mr. Sandoval participated in the shooting in any way was Mr. Gonzalez's uncorroborated testimony that Mr. Sandoval spoke with Mr. Zuniga over the phone and told Mr. Zuniga that Mr. Sandoval and Mr. Gonzalez had seen police at a Keybank. RP 1918, 2048. However, Mr. Gonzalez could not remember who called who (RP 1918, 2048) and Mr. Villagomez testified that it was Mr. Zuniga who was making calls the night of the shooting. RP 996. Mr. Sandoval confirmed he spoke to Mr. Zuniga but

denied telling Mr. Zuniga that Mr. Sandoval and Mr. Gonzalez had seen any police. Plaintiff's Exhibit 5-F, p. 12.

Viewed in the light most favorable to the State, the State's own evidence establishes that Mr. Sandoval ignored the command to look out for police and rival gang members given to him by Mr. Zuniga and took steps to not be involved with the shooting. Mr. Sandoval was ordered by Mr. Zuniga to drive around the area of 72<sup>nd</sup> street to watch out for police and rival gang members and to call Mr. Zuniga if he saw police or rival gang members. Instead, Mr. Sandoval and Mr. Gonzalez drove to a park, smoked marijuana, left the park only when other members of the gang spotted them, then drove to another parking lot and continued to smoke marijuana before going to a McDonald's to get food for Mr. Gonzalez's children.

Viewed in the light most favorable to the State, the State's evidence establishes, at most, that Mr. Sandoval might have had knowledge that a shooting might occur. The State presented no evidence that Mr. Sandoval was "ready to assist" in the shooting or performed any act with knowledge that it would promote or facilitate the crime. If anything, the evidence introduced at trial was that Mr. Sandoval consciously disobeyed Mr. Zuniga and chose not to perform his assigned

role of lookout and, instead, chose to stay in a park and a parking lot and smoke marijuana.

The State presented insufficient evidence to establish that Mr. Sandoval was an accomplice to either shooting. Accordingly, the State presented insufficient evidence to convict Mr. Sandoval of being an accomplice to either first degree murder or first degree assault.

2. The State presented insufficient evidence to establish that Mr. Sandoval was a member of a conspiracy to commit murder.

A person is guilty of criminal conspiracy if, with the intent to commit a crime, he agrees with one or more persons to engage in or cause the performance of such conduct, and any member of the conspiracy takes a substantial step in pursuance of the agreement. RCW 9A.28.040(1).

Mr. Sandoval was charged with conspiracy to commit first degree murder in violation of RCW 9A.32.030(1)(a). CP 85-86. Under RCW 9A.32.030(1)(a), “A person is guilty of murder in the first degree when[, w]ith a premeditated intent to cause the death of another person, he...causes the death of such person or of a third person.” Thus, the State’s burden regarding the conspiracy charge against Mr. Sandoval was to prove that Mr. Sandoval, with the intent to commit a premeditated murder, agreed with one or more persons to engage in or cause a

premeditated murder, and any member of the conspiracy took a substantial step in pursuance of the agreement.

- a. *The State presented insufficient evidence to establish that Mr. Sandoval ever entered an actual agreement to commit a murder.*

“[A]n agreement to commit a crime is an essential part of a conspiracy.” *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1997). The State must show an actual, rather than feigned agreement with at least one other person to prove conspiracy. *State v. Stark*, 158 Wn.App. 952, 962, 244 P.3d 433 (2010), *review denied* 171 Wash.2d 1017, 253 P.3d 392 (2011), *citing State v. Pacheco*, 125 Wn.2d 150, 159, 882 P.2d 183 (1994). “A conspiracy has been defined as “a partnership in criminal purposes. ***The gist of the crime is the confederation or combination of minds.***” *State v. Dent*, 123 Wn.2d 467, 475, 869 P.2d 392 (1994) (Emphasis added).

The State does not need to show a formal agreement. *Stark*, 158 Wn.App. at 962, 244 P.3d 433, *citing State v. Barnes*, 85 Wn.App. 638, 664, 932 P.2d 669 (1997). The conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Id.* This proof may be circumstantial. *Stark*, 158 Wn.App. at 962, 244 P.3d 433, *citing State v. Israel*, 113 Wn.App. 243, 284, 54 P.3d 1218 (2002).

The State presented evidence of three meetings of the ELS gang between the shooting of Mr. Toleafoa and the shooting of the Loves at which Mr. Sandoval could have agreed to engage in or cause a murder: a meeting at Byron Maderos' residence the night of Mr. Toleafoa's shooting where people were angry about the shooting of Mr. Toleafoa and were talking about "doing something about it" meaning looking for rival gang members and shooting at them (RP 938-939; Plaintiff's Exhibit 5-F, p. 5); the meeting at Mr. Zuniga's house the day after Mr. Toleafoa's shooting (RP 943-947, 1921-1924; Plaintiff's Exhibit 5-F, p. 7-8); and a meeting at Mr. Zuniga's home on the day of the shooting. RP 1932-1933.

However, the State's evidence does not support the inference that Mr. Sandoval ever agreed to commit a murder at any of these meetings. At the meeting at Mr. Maderos' home, people talked about looking for rival gang members to shoot at but the meeting ended with Mr. Zuniga telling the gang members to meet at his house the next day to talk about what had happened. RP 938-939, 943-944. At the first meeting at Mr. Zuniga's home, Mr. Zuniga was the only one talking and nobody responded. RP 1925-1926, 1928. Mr. Sandoval was present but "wasn't really talking" about the retaliation issue. RP 1925. The only discussion at the first meeting at Mr. Zuniga's home was Mr. Zuniga telling Mr. Salavea and Mr. Time to steal the van for the shooting and then for



everyone to meet at his home the next day. RP 1934-1935. At the second meeting at Mr. Zuniga's home, Mr. Zuniga told everyone what they were supposed to do. RP 1932-1936. Mr. Zuniga was the only one who spoke at the meeting where he told people what to do. RP 972.

Mr. Sandoval told police that at the meeting at Mr. Maderos' residence he thought it was senseless to go after anyone because he didn't feel there was proof enough to blame anyone for Mr. Toleafoa's shooting but that he couldn't speak against Mr. Zuniga. Plaintiff's Exhibit 5-F, p. 6-7. Mr. Sandoval told the police that he got into Mr. Gonzalez's vehicle in order to not be involved with the shooting. Plaintiff's Exhibit 5-F, p. 8.

The State's evidence does not support an inference that Mr. Sandoval ever either actually agreed or feigned agreement to assist in committing a murder. No action taken by Mr. Sandoval indicates any intent on his part to agree to kill anyone or to assist in killing anyone. In fact, Mr. Sandoval's actions of not doing what Mr. Zuniga told him to do and, instead, staying in parking lots and smoking marijuana indicates a clear intent on Mr. Sandoval's part to **avoid** being involved in the activity related to the shooting.

The State presented insufficient evidence to support an inference that Mr. Sandoval actually agreed with anyone to participate in any murder.

b. *Even if Mr. Sandoval had agreed to look for cops and bloods, he did not agree to commit the crime of murder.*

In an abundance of caution, should this court find that Mr. Sandoval's actions indicate he agreed to assist the other gang members by acting as a lookout, the evidence introduced at trial do not support the inference that Mr. Sandoval agreed to commit a premeditated murder.

As stated above, by charging Mr. Sandoval with conspiracy to commit first degree murder under RCW 9A.32.030(1)(a), the State's burden was to prove that Mr. Sandoval agreed to commit a premeditated murder. However, the evidence introduced at trial was that the gang members were planning to go out looking for rival gang members to shoot at. There was no agreement or plan that the shooting was going to end in the death of any person. The agreement was simply to shoot at people with no agreement as to what, if any, degree of injury would be inflicted by the shooting. Shooting at people could have resulted in no injuries, in non-fatal injuries, or in fatal injuries. Had the shooting resulted only in scaring people of injuring but not killing people, then the shooting would have been an assault, not a murder. However, the State's burden was to prove that Mr. Sandoval had agreed to commit a murder, not an assault. The State presented insufficient evidence to establish that Mr. Sandoval entered an agreement to kill anyone.

## **VI. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Sandoval's convictions and remand for dismissal of the charges with prejudice.

DATED this 3<sup>rd</sup> day of December, 2012.

Respectfully submitted,

/s/

Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

### **Certificate of Service:**

The undersigned certifies that on December 3, 2012, she delivered by e-mail to the Pierce County Prosecutor's Office, [ppatcecf@pierce.wa.us](mailto:ppatcecf@pierce.wa.us), and by United States mailed to appellant, Eduardo Sandoval, DOC # 332626, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, Washington 99362, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on December 3, 2012.

/s/

Norma Kinter

# ARNOLD LAW OFFICE

**December 02, 2012 - 10:09 AM**

## Transmittal Letter

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Court of Appeals Case Number: 43039-8

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